

James B. Gessford  
Rex R. Schultze\*\*\*  
Daniel F. Kaplan  
Gregory H. Perry  
Joseph F. Bachmann\*  
R. J. Shortridge\*  
Joshua J. Schauer\*  
Derek A. Aldridge\*\*  
Justin J. Knight\*\*\*\*  
Charles Kaplan  
Haleigh B. Carlson



Of Counsel  
John M. Guthery  
Thomas M. Haase  
Richard D. Sievers  
Kelley Baker

\*Also admitted in Iowa  
\*\*Also admitted in Kansas  
\*\*\*Also admitted in Wyoming  
\*\*\*\*Also admitted in Colorado

PERRY, GUTHERY, HAASE & GESSFORD, P.C., L.L.O.

October 22, 2018

Ernest B. Perry (1876-1962)  
Arthur E. Perry (1910-1982)  
R. R. Perry (1917-1999)  
Edwin C. Perry (1931-2012)

Adam B. Steinbaugh  
Director, Individual Rights Defense Program  
Foundation for Individual Rights in Education  
510 Walnut Street  
Suite 1250  
Philadelphia, PA 19106

*RE: Southeast Community College Request for Records*

Dear Mr. Steinbaugh:

Southeast Community College ("SCC") received your request for records, dated October 15, 2018. Our office, as legal counsel to SCC, has been asked to respond to your request. At the outset, I note that your signature block indicates that you are a resident of Philadelphia, Pennsylvania. Please note that Nebraska records requests may only be made by the "citizens of this state," per Neb. Rev. Stat. § 84-712. As such, your records request is not authorized by Nebraska law.

In addition, SCC does not possess or maintain any records as that term is defined at Neb. Rev. Stat. §84-712.01, through or from Facebook, Twitter or other social media platforms. Your email specifically requests that SCC follow various weblinks to access information stored by Facebook or Twitter. As such, your request seems to acknowledge that (a) your requested documents do not currently exist, and (b) SCC would need to obtain those documents from a third party (i.e., Facebook and Twitter). Neb. Rev. Stat. §84-712.01 defines public records as "records and documents, regardless of physical form, of or belonging to" a political subdivision. Information on a social media platform does not belong to SCC, and there would be no requirement for SCC to conduct a search of those social media platforms to respond to your request.

In the event that you wish to obtain records or documents from Facebook or Twitter, you will need to address your request to those entities.

Finally, your request cannot reasonably be fulfilled within four business days, due to above-referenced reasons. If you wish to modify your request, please let us know. Since this response does include a denial of public records, the following required statutory notice for a public records denial is as follows:

NOTICE: Pursuant to Neb. Rev. Stat. § 84-712.03, you may have a right of judicial or administrative review of the denial of access to school district records set forth above, including a right to petition for a writ of mandamus, or petition the Attorney General to review the record to determine if it may be withheld from public inspection.

Sincerely,

PERRY, GUTHERY, HAASE  
& GESSFORD, P.C., L.L.O.

A handwritten signature in black ink, appearing to read "Rex R. Schultze", written in a cursive style.

Rex R. Schultze

cc: Paul Illich, President



October 31, 2018

Rex R. Schultze  
Perry, Guthery, Haase & Gessford, P.C., L.L.O.  
233 South 13 Street, Suite 1400  
Lincoln, Nebraska 68508

*Sent via U.S. Mail and Electronic Mail (rschultze@perrylawfirm.com)*

Dear Mr. Schultze:

I am in receipt of your October 22, 2018, letter on behalf of Southeast Community College (“SCC”) rejecting my October 15, 2018, request under the Nebraska Public Records Law. That request seeks records concerning SCC’s official Facebook and Twitter pages and the settings SCC has placed on content that may be posted on, or persons who may access, those pages.

SCC advances three arguments in support of its rejection: (1) that only citizens of Nebraska have standing to make requests under the Public Records Law; (2) that “the documents do not currently exist” because obtaining them requires use of a hyperlink; and (3) that the records do not “belong” to SCC because they are accessible via Facebook and Twitter. I am writing to ask that SCC reconsider its positions. I address each argument in turn.

First, SCC maintains that Nebraska records requests may only be made by “citizens of this state,” citing Neb. Rev. Stat. § 84-712. While the statute does indeed recite these words, it proceeds to add that this right extends to “and all other persons interested in the examination of the public records[.]” While I am not a citizen of Nebraska, I am within the class of “other persons” authorized to make requests under the Nebraska Records Law.

SCC next argues that the records “do not currently exist” because they are accessed via hyperlink. Yet the statutory authority cited by SCC for this proposition expressly includes “all records *and* documents, *regardless of physical form.*” Neb. Rev. Stat. § 84-712.01 (emphasis added). The record exists in the form of data provided by SCC to Facebook and Twitter. How the information is located is irrelevant to whether it exists, and providing a hyperlink is no different than describing the file cabinet or folder in which the record may be found.

Third, SCC argues that the records do “not belong to SCC” because they pertain to “information stored by Facebook or Twitter.” On this basis, SCC recommends that I address my inquiry to Facebook or Twitter. Yet public access to records turns on whether the agency has access, not whether it is in physical possession of records. Nebraska’s Supreme Court, construing the “of or belonging to” language relied upon by SCC here, has expressly declined to accept the notion that physical possession is dispositive. *Evertson v. City of Kimball*, 278 Neb. 1, 9–10 (2009). The Court wrote:

The City argues that the “of or belonging to” language in § 84-712.01 means a public body must have ownership of, as distinguished from a right to obtain, materials in the hands of a private entity. But the City’s narrow reading of the statute would often allow a public body to shield records from public scrutiny. It could simply contract with a private party to perform one of its government functions without requiring production of any written materials.

Section 84-712.01 does not require a citizen to show that a public body has actual possession of a requested record. Construing the “of or belonging to” language liberally, as we must, this broad definition includes any documents or records that a public body is entitled to possess--regardless of whether the public body takes possession. The public’s right of access should not depend on where the requested records are physically located. Section 84-712.01(3) does not permit the City’s nuanced dance around the public records statutes.

*Id.*

Accordingly, even assuming the records were held by private parties,<sup>1</sup> those records remain subject to the Public Records Law if (1) the public body “contracted with a private party to carry out [a] government function; (2) the private party prepared the records under the public body’s delegation of authority; (3) the public body was entitled to possess the materials to monitor the private party’s performance; and (4) the records are used to make a decision affecting public interest.” *Id.* at 12. In utilizing Facebook and Twitter to operate public fora, SCC has created records on Facebook and Twitter which it is “entitled to possess” at any time, day or night, by entering its login information. These records determine what content may be posted—and who may post content—on SCC’s open social media fora.

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<sup>1</sup> To the contrary, SCC maintains control over the information at all times. That the information is stored on a server makes it no less an agency record than an email stored on a Google server, or a Word document stored on iCloud.

Finally, I should note that of the 220 institutions polled in this survey, only 15 have objected to production or asked for compensation to fulfill the requests. That leaves SCC conspicuously in the minority of institutions that have refused to disclose the regulations they impose on public speech on the digital fora created by those public institutions.

Please apprise me before the close of business on Wednesday, November 7, 2018, whether SCC will comply with the Nebraska Public Records Law by providing the requested records.

Sincerely,



Adam Steinbaugh  
Director, Individual Rights Defense Program



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Suite 1250  
Philadelphia, PA 19106



PERRY, GUTHERY, HAASE & GESSFORD, P.C., L.L.O.

November 6, 2018

Of Counsel  
John M. Guthery  
Thomas M. Haase  
Richard D. Sievers  
Kelley Baker

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*RE: Request for Information*

Dear Mr. Steinbaugh:

I am in receipt of your email and letter, both dated October 31, 2018. In your letter, you request that Southeast Community College ("SCC") reconsider its denial of your request. SCC respectfully declines to do so.

As your letter acknowledges, your request is one for information. You are asking a question about Facebook and Twitter pages. You are not requesting documents that SCC currently possesses—you are asking SCC to follow various hyperlinks in order to create and print new documents. Indeed, SCC would need to create new documents in order to respond to your request. Since public entities in Nebraska are not required to respond to requests for information or create documents that do not otherwise exist, SCC stands by its denial of your request. *See, e.g., Neb. Atty. Gen. Op. 94035* ("The Public Records Statutes, on the other hand, do not require public officials to provide copies of public records, to answer questions, or to create documents which do not otherwise exist.") As such, your public records request remains denied for the same reasons set forth in my initial letter to you, as well as for the reasons set forth in the response by Metro Community College to your identical request to them.

I would also note that our office consulted with Leslie Donley, Assistant Attorney General for the State of Nebraska. Ms. Donnelly concurs with our analysis. However, if you wish to appeal this decision, you may do so under the procedure outlined in my initial letter.

With all of this being said, we conferred with SCC's technology department and can confirm that no person, words or phrases are "blocked" or otherwise censored on any Facebook or Twitter page.

Sincerely,

PERRY, GUTHERY, HAASE  
& GESSFORD, P.C., L.L.O.

A handwritten signature in black ink, appearing to read 'Rex R. Schultze'.

Rex R. Schultze